IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 10.08.2007

CORAM:

THE HONOURABLE MR.JUSTICE A.C.ARUMUGAPERUMAL ADITYAN

CRL.A.NO.587 OF 2007

M/s C.Krishna & Co.,
A registered Partnership Firm
by its Partnership
1.K.Velkrishna
2.K.Geetha
represented by their Power of
Attorney M.Shah Nawaz .. Appellants/Complainants

-vs-

J.Vijayalakshmi .. Respondent /accused

This Revision is filed against the Judgment of the learned Judicial Magistrate No.V,Salem in C .C.No.28/1998 dated 21.7.2000.

For appellants :: Mr.M.Duraisamy
For respondent :: Mr.P.Jagadeesan

JUDGMENT

This appeal has been preferred against the Judgment in C.C. No.28 of 1998 on the file of the Judicial Magistrate No.V,Salem.

2) The appellants have filed a private complaint under Section 200 Cr.P.C. against the accused for an offence under Section 138 of Negotiable Instruments Act 1881(hereinafter referred to as"the Act" on the ground that the impugned cheque Ex P8 drawn by the accused for a sum of Rs.6,89,000/- to discharge a subsisting liability for a sum of Rs.5,50,000/- being the principal amount borrowed under Ex P2 to ExP7 promissory notes including the future interest up to 6.11.1997 ie., one day prior to the date of the drawal of Ex P8 impugned cheque. The case of the complainants is that on presentation of the impugned cheque ExP8 with the bank, the same was returned with an endorsement that there is no sufficient funds in the account of the accused. Ex P9 is the memo of the bank sent along with Ex P8 impugned cheque at the time of dishonouring the same. The complainant has issued a notice as contemplated under Section 138(b) of the Act under the original of Ex P10, which was received by the accused under Ex P11.Since the accused has not chosen to send any reply notice nor made any arrangement to repay the debt, the complainants have preferred the complaint.

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3) After recording the sworn statement of the complainants, the learned Judicial Magistrate No.V,Salem had taken on file the case as C.C.No.28 of 1998 and on the appearance of the accused on summons, furnished copies under Section 207 of Cr.P.C. and when the offence was explained to the accused, and questioned, the accused pleaded not guilty.

4) On the side of the complainant, the power of attorney was examined as P.W.1. Ex P1 is the deed of power of attorney in favour of P.W.1 dated 15.12.1997. According to P.W.1, the accused along with her husband had borrowed a sum of Rs.5,50,000/- from the complainants under six promissory notes which are Exs P2 to P7 . As on 7.11.1997, the amount due to the complainants towards principal and interest comes to Rs.6,89,000/- and in order to discharge the said amount, the accused had drawn a cheque dated 7.11.1997 in favour of the complainants' firm which is ExP8, when the said cheque was presented in the bank for collection, the same was returned with an endorsement that there is no sufficient fund in the account of the accused to honour the same. EX P9 is the banker's memo sent along with ExP8 impugned cheque. Thereafter, the complainants had issued a notice dated 11.11.1997 under the original of Ex P10 which was received by the accused under Ex P11 acknowledgment on 17.11.1997,but no reply notice was sent by the accused.

5) P.W.2 is the Manager of Indian Overseas Bank, Alazhapuram Branch. He would admit that the complainants are having an account in his branch and that the impugned cheque Ex P8 was presented by the complainants for collection on 7.11.1997, but the same was returned by the bank on the ground that there is no sufficient funds in the account of the accused to honour the same. Ex P9 is the memo sent along with ExP8 at the time when the same was dishonoured by the bank. Ex P12 is the copy of the statement of account relating to the accused. It is seen from Ex P12 statement of account relating to the accused, a sum of Rs.633/- alone was in the credit of the account of the accused.

6) When incriminating circumstances were put to the accused, the accused would totally deny her complicity with the crime. On the side of the accused, D.W.1 and D.W.2 were examined and Exs D1 and D2 were exhibited.

7)After going through the oral and documentary evidence, the learned trial Judge has come to the conclusion that the offence under Section 138 of the Act was not attracted against the accused and accordingly dismissed the case, which necessitated the complainants to prefer this appeal.

8) Now the point for determination in this appeal is whether the findings of the learned trial Judge is full of manifest error and perverse in nature leading to miscarriage of justice warranting any interference from this Court?

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9) Heard Mr. M.Duraiswamy, learned Counsel for the appellants and Mr.P.Jagadeesan, the learned counsel appearing for the respondent and considered their respective submissions.

10) The point:
The learned counsel for the appellants would draw the attention of this Court to the admissions about the borrowal of the accused's husband in his evidence as D.W.2. The vain attempt made by D.W.2(the husband of the accused) is that EX P8 impugned cheque is bearing the cheque leaf No.0122974. But the earlier cheque leaf Nos.0122975 and 0122976 have been drawn by the accused on 4.10.1995 and 6.10.1995 respectively. So the earlier cheque leaf bearing No.0122974 would not have been drawn on 7.11.1997 and the impugned cheque ExP8 which was given only as a security for the loan borrowed was manipulated and used by the complainants for the purpose of this case. But the fact remains that even after the receipt of the statutory notice issued by the complainants as per Section 138(b) of the Act, the accused has not sent any reply raising a defence that the impugned cheque is forged one and was not drawn by the accused on 7.11.1997. The mere fact that Ex P8 impugned cheque leaf is earlier to the cheque drawn on 4.10.195 and 6.10.1995 will not lead us to an inference that it should have been drawn earlier to 4.10.1995 on which date the cheque leaf bearing No. 0122975 was drawn by the accused.

11) Further before the trial Court, the accused has not taken any steps to show that Ex P8 impugned cheque was forged by the complainants only for the purpose of this case. It is a definite case of P.W.1, the power of attorney holder of the complainants, before the trial Court that Ex P8 impugned cheque was drawn on 7.11.1997 by the accused only to discharge both the principal as well as the interest due under Exs P2 to P7 promissory notes. A memo of calculation was also filed before this Court, which shows that as on 6.11.1997 the amount due to the complainants under Exs P2 to P7 promissory notes inclusive of the accused comes to Rs.6,89,545/- whereas Ex P8 impugned cheque was drawn only for a sum of Rs.6,89,000/- . It is seen from the evidence of P.W.2, the Manager of the Indian Overseas Bank, Alazhapuram Branch, who has also been examined as D.W.1 on the side of the accused, Ex P8 impugned cheque was presented by the complainants for collection on 7.11.1997 itself, but the same was returned by the bank on the ground that there is no sufficient funds in the account of the accused to honour the same. Ex P9 is the banker's memo sent along with Ex P8 impugned cheque at the time of dishonour. There is no acceptable explanation has been given by the accused for not sending any reply to the notice received by him under the original of Ex P10, even after the receipt of the same under Ex P11 acknowledgment. The presumption under Section 139 of the Act is unless the contrary is proved, the holder of a cheque received the same only for the discharge of whole or in part of any debt or other liability. The reasoning given by the learned Judicial Magistrate in dismissing the case, in my opinion is full of manifest error and perverse in nature leading to miscarriage of justice warrants interference from this Court. Point is answered accordingly.

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12)As held by the Honourable Apex Court in Goa Plast (P) Ltd.v.Chico Ursula D'Souza (2004) 2 Supreme Court Cases 235) the accused is liable to be pay double the total amount of the cheque. In this case, it comes to Rs.13,78,000/-. The relevant observation of the honourable Apex Court in the above said ratio decidenti runs as follows:

> ". . . . . We have no doubt that the respondent has committed an offence punishable under the provisions of Section 138 of the Act and is liable to be punished. The transaction in question took place between the parties in the year 1993, therefore, Section 138 , as it stood at the relevant time, would be applicable to the present case. Section 138 provides imprisonment for a term which may extend to one year, or with fine which may extend to twice the amount of the cheque, or with both. Section 138 has now been amended and the penalty of imprisonment for a term which may extend to one year has been substituted by two years as provided by the amending Act of 2002 and the fine which may extend to twice the amount of the cheque. This has been prescribed as the punishment for the offence under Section 138 of the Act. The object and the ingredients under the provisions, in particular Sections 138 and 139 of the Act cannot be ignored. Proper and smooth functioning of all business transactions, particularly, of cheques as instruments, primarily depends upon the integrity and honesty of the parties. In our country, in a large number of commercial transactions, it was noted that the cheques were issued even merely as a device not only to stall but even to defraud the creditors. The sanctity and credibility of issuance of cheques in commercial transactions was eroded to a large extent. Undoubtedly, dishonour of a cheque by the bank causes incalculable loss, injury and inconvenience to the payee and the entire credibility of the business transactions within and outside the country suffers a serious setback. Parliament,in order to restore the credibility of cheques as a trustworthy substitute for cash payment enacted the aforesaid provisions. The remedy available in a civil Court is a long-drawn matter and an unscrupulous drawer normally takes various pleas to defeat the genuine claim of the payee"

13)In fine, the appeal is allowed and the Judgment in C.C.No.28 of 1998 on the file of the Judicial Magistrate No.V,Salem is set aside and the accused is convicted under Section 138 of the Negotiable Instruments Act 1881 and given six months time to pay a sum of Rs.13,78,000/-(Rupees Thirteen Lakhs seventy eight thousand)only (double the amount of the cheque)towards compensation to the complainants in default to suffer simple imprisonment for one year .

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14. The learned counsel appearing for the respondent would represent that a Civil Suit O.S.No.132 of 2005 on the file of Fast Track Court NO.2, Salem, has been filed by the complainants on the basis of Ex P2 to Ex P7 promissory notes. It is made clear that any payment made in this case shall be adjusted towards the decree amount in O.S.No.132 of 2005 on the file of Fast Track Court No.II, Salem.

sd/-
Asst.Registrar

/true copy/

Sub Asst.Registrar

sg
To

1. The Judicial Magistrate No.V,Salem

2. Fast Track Court No.II, Salem,

3. do- through the Chief Judicial Magistrate , Salem.

+ 1 cc to Mr.M.Dudraiswamy Advocate SR.NO.50004
+ 1 cc to Mr.P.Jagadeesan Advocate SR.NO.50133

GK (CO)
RD 18.8.07

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